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S E C R E T SECTION 01 OF 05 TOKYO 003532

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SUBJECT: CONSULTATIONS WITH JAPAN ON IMPLEMENTING THE OSLO
CONVENTION ON CLUSTER MUNITIONS

Classified By: Charge d'Affaires, a.i. James P. Zumwalt. Reasons 1.4 (b) (d)

11. (S) SUMMARY: Japan is committed to ensuring that activities of U.S. forces in Japan will not be hindered or restrained following Diet ratification of the Oslo Convention on Cluster Munitions (CCM), MOFA Deputy Director General Nakajima told Deputy Assistant Secretary of State Ganyard during December 11-12 meetings. The Diet will likely ratify the convention and pass implementing legislation penalizing activities prohibited by the CCM next spring. The Ministry of Economics, Trade and Industry (METI) is drafting the legislation and, in coordination with MOFA, is attempting to write in exemptions for Japanese companies and citizens engaged in transporting or other activities involving U.S. cluster munitions (CM) in Japan. DAS Ganyard told DDG Nakajima that broad stroke mechanisms that provide U.S. forces flexibility in day-to-day and contingency operations would best allow the United States to meet its treaty obligations to protect Japan. On the public diplomacy front, it will be important to highlight both the military necessity of CM for the defense of Japan and the efforts by the U.S. to address humanitarian concerns associated with these systems. DAS Ganyard updated DDG Nakajima on consultations with the UK by explaining that letters between Foreign Secretary Miliband and Secretary Rice, the exchange of which will be kept low key, will state that HMG made a policy decision, not a legal decision, in asking the U.S. to remove CM from UK territory. DAS Ganyard and DDG Nakajima agreed to continue consultations on CM and to discuss how to have the Convention on Conventional Weapons reengage on CM. End summary.

12. (U) State Department Political-Military Affairs Bureau Deputy Assistant Secretary Stephen Ganyard met with Ministry of Foreign Affairs Deputy Director General for Foreign Policy and Disarmament, Non-Proliferation and Science Cooperation Akihiko Nakajima December 11-12 for consultations on how Japan will implement the Oslo Convention on Cluster Munitions (CCM). DAS Ganyard was joined by representatives from the Office of the Secretary of Defense, Joint Chiefs of Staff, U.S. Forces Japan (USFJ), and the Embassy. DDG Nakajima was

joined by representatives from MOFA's Conventional Arms, Japan-U.S. Security Treaty and Treaty Divisions, as well as the Ministry of Defense (MOD). On December 12, representatives from the Ministry of Economy, Trade and Industry's (METI) Aerospace and Defense Industry Division also joined the consultations.

Ratification and Implementation Timeline

13. (C) DDG Nakajima reported the GOJ is drafting legislation to implement the CCM, studying how to dispose of its CM, making efforts to acquire alternative measures to CM, and requesting funding for these activities. The GOJ is making extreme efforts, Nakajima said, to ensure U.S. forces' operations and activities in Japan, particularly the transportation and stockpiling of CM, will not be restrained or substantially hindered. METI, in close coordination with MOFA, is responsible for drafting and passing implementing legislation which will penalize activities forbidden by the CCM. The goal is to include exemptions for activities associated with U.S. forces transporting CM into and within Japan and stockpiling CM in Japan, DDG Nakajima stated.

14. (C) The Government of Japan will submit the CCM for ratification and seek to pass the implementing legislation during the next regular Diet session, which commences in January 2009, DDG Nakajima explained. The Diet will receive the draft legislation in February, although the Diet

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committees will not take these up until April following the expected January-March deliberations on Japan's annual budget. CCM ratification and passage of the implementing legislation will occur in April, or at the latest, May. The CCM will come into force six months after ratification by thirty nations, per Article 17 of the convention. DDG Nakajima believes Diet members who are proponents of the ban will frequently raise CM, including U.S. forces' cluster munitions, even before the Diet officially takes up the ratification instruments and implementing legislation.

Interpreting the Oslo Convention

15. (C) Although Article 9 of the CCM requires Japan to ensure activities prohibited by the CCM are not undertaken by persons or on territory under its control, DDG Nakajima explained, the GOJ recognizes U.S. forces in Japan are not under Japan's control and hence the GOJ cannot compel them to take action or to penalize them. Article 21.3 allows military cooperation and operations between states party and not party to the convention. As such, 21.3 permits the transportation of CM, including loading and offloading of ships, planes, etc. at Japanese ports, by members of the Japan Self-Defense Forces (JSDF), Japanese employees at U.S. bases, or private Japanese companies.

16. (C) However, MOFA is interpreting Article 21.4(a) to mean Japan is obligated to not allow U.S. forces to develop, produce or acquire CM in Japan. The main reason for this interpretation is that, unlike 21.4 (b) and (c), 21.4 (a) does not include the word "itself" and hence MOFA legal experts believe 21.4(a) applies not only to Japan and but also to others on its territory. Japan interprets "acquire" as the transfer of title of ownership from one entity to another. Therefore, as long as the U.S. ownership of the CM that are in Japan or that are brought into Japan does not change, U.S. forces in Japan will not be "acquiring" CM and are allowed to transport CM into or within Japan despite Japan's interpretation of Article 21.3(a), MOFA representatives explained.

17. (C) The U.S. side stated that no other signatories to

the CCM had interpreted 21.4(a) in this way. This interpretation raises new issues to consider, such as whether final assembly in Japan equates to production. Given USFJ's role as rear support for United Nations Command for contingencies on the Korea peninsula, third country's CM could flow through Japan, and with title potentially transferring to U.S. forces. This intention would mean U.S. forces could be "acquiring" CM in Japan, which would not be allowed under Japan's interpretation. Both sides agreed on the need for further bilateral consultation.

Implementing CCM in Japan

18. (C) During the December 12 session that METI representatives joined, DDG Nakajima explained that the Status of Forces Agreement (SOFA) allows the United States to stockpile and store CM on JSDF bases, while Article 21.3 of the CCM allows JSDF personnel to handle U.S. CM and U.S. forces and JSDF to engage in bilateral operations and activities involving CM. The critical overlap of U.S. forces activities with the CCM implementing legislation that METI is drafting is the contracting of Japanese companies and nationals by U.S. forces to transport and handle CM in Japan, DDG Nakajima stated.

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19. (C) METI and MOFA are considering how to exempt Japanese companies and citizens under contract with the U.S. military from the criminal penalties that the implementing legislation will establish, DDG Nakajima continued. A critical piece of this effort is recognizing which companies are engaged in these activities. MOFA proposed drafting a new Joint Committee agreement that would say the United States will: 1) provide, and continually update, a list of transport companies and contractors to the GOJ; 2) agree to only use those entities to transport or handle CM outside U.S. bases; and 3) ensure the contractors carry documentation from U.S. forces indicating they are contracted to handle munitions.

110. (C) METI Aerospace and Defense Industry Division Director Naoshi Hirose explained that with this kind of procedure in place, METI can write legislation that exempts U.S. forces-related activities while at the same time meeting expectations that only Japanese companies and nationals contracted by the U.S. military are dealing with CM in Japan. METI will need to coordinate with and explain the draft legislation to various parts of the government within the next month. Therefore, METI would like to begin consulting with U.S. forces in Japan as soon as possible to ensure the legislation and Joint Committee agreement meet the U.S. military's and Japan's needs, Hirose said.

111. (C) DAS Ganyard responded that keeping legislation and agreements as broad as possible would best allow the U.S. to meet its treaty obligations to protect Japan. USFJ representatives explained that U.S. forces need as much flexibility as possible in day-to-day and, more importantly, in contingency operations. Developing procedures specific to cluster munitions will greatly reduce the flexibility and could lead to security and operational compromises. DAS Ganyard recognized Japan's efforts to preserve the ability of U.S. forces in Japan to maintain current activities. He also said the United States understands the short timeline METI and MOFA are facing and pledged that the United States would work quickly and thoroughly with Japan.

Strategy to Engage Politicians and the Public

112. (C) MOFA Conventional Arms Division Director Hirano told DAS Ganyard that Japan's top leaders are interested in CM, especially as nearly all Japanese politicians have

commended the government for signing the CCM. Some politicians are aware that the U.S. military could be transporting and stockpiling in Japan. These politicians are also concerned that U.S. forces could potentially use CM on Japanese territory. There is already talk that the GOJ should take the route it did with nuclear weapons and not allow any CM, U.S.-owned or otherwise, in Japan. As MOD explains its purchase of alternative measures to fill the capability gap caused by Japan destroying its CM arsenal, CM opponents could call for the United States to remove its CM from Japan. The MOFA representatives sought the U.S. delegation's views on messages to the Diet and public.

¶13. (C) DAS Ganyard suggested that an overarching public diplomacy strategy should focus on balancing military benefit with humanitarian concerns. Japan purchased CM for clear military reasons and those have not changed. Despite the clear military utility of CM for its defense, Japan agreed to a ban on CM due to humanitarian concerns. The U.S., on the other hand, is obligated and committed to defend Japan and depending on the scenario deploying CM could be the most efficient and humane method to meet this obligation. The U.S. has decided to address the humanitarian concerns by improving targeting and reliability so CM will more likely

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hit intended targets and leave as little unexploded ordnance behind as possible. However, the U.S. military use of CM in Japan, which would likely mean foreign soldiers having invaded Japanese territory, is very unlikely. In any case, CM would only be used when appropriate for the situation and then only in a very discriminating fashion, the U.S. side explained.

¶14. (C) MOFA Hirano said explaining to the Japanese public that the U.S. shares the humanitarian concerns and hence will deploy more reliable CM, while helpful, will not in the end win over the public. MOFA Japan-U.S. Security Treaty Division Principal Deputy Director Tomoaki Ishigaki suggested stating clearly that the U.S. has a treaty obligation to defend Japan and precluding the use of CM will make it harder to do that. In the unlikely event that the U.S. might find it necessary to use CM in Japan, the U.S. will exercise "self-restraint" and not employ CM arbitrarily, indiscriminately or without considering humanitarian concerns. This straight forward strategy could be the best way to win over the public, Ishigaki said. Both sides agreed to continue to consult on a coordinated public affairs/public diplomacy strategy.

Consultations with the UK and Others

¶15. (C) DAS Ganyard explained that HMG asking the United States to remove all CM from UK territory within eight years of CCM ratification is a policy decision and goes beyond the HMG's interpretation of its legal obligations under the CCM. The letter from Foreign Secretary Miliband to Secretary Rice, likely to be transmitted this month, will clearly state this. The UK also understands the effect its decision will have on Japan and is committed to keeping the exchange of letters as low key as possible. Japan is on a faster ratification path than the UK, DAS Ganyard continued. The UK will not begin its ratification process until 2010 as the CCM signing occurred after the government completed its compilation of legislation the British Parliament will take up in 2009. Italy and Germany, the other countries in Europe where the United States has significant CM stores, have indicated the CCM means no change in the status quo, while NATO has stated that Article 21 preserves interoperability, DAS Ganyard told DDG Nakajima.

Future of the Convention on Conventional Weapons

¶16. (C) Some countries that wanted to make sure the Convention on Conventional Weapons (CCW) did not detract from the December 3 CCM signing deliberately scuttled the CCW, DAS Ganyard stated. Now that the CCM is signed, perhaps it is time to reengage and discuss a way ahead for the CCW, especially as before the CCW talks fell through progress was being made on a text that China and Russia indicated they could sign. DAS Ganyard asked DDG Nakajima to consider possibilities for reengagement in the CCW. DDG Nakajima responded that he is pessimistic on whether discussions on CM in the CCW will lead anywhere. Countries that signed the Oslo Convention on CM are not interested in engaging in the CCW, with the core Oslo nations confident that there is no need to compromise now that 93 countries have signed the CCM. That said, officially, Japan's goal is to realize an agreement on CM within the CCW agreement and hence Japan is willing to discuss how to reinvigorate the CCW talks (which resume February 16), DDG Nakajima stated.

¶17. (U) DAS Ganyard cleared this cable.

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